APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No 06-6363

[Filed July 26, 2007]

JEFF GEORGE, Plaintiff-Appellant,

v.

AERO LODGE 735, Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

ORDER

Before: KEITH and GRIFFIN, Circuit Judges; VAN TATENHOVE, District Judge.*

* The Honorable Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Jeff George, a Tennessee litigant proceeding through counsel, appeals a district court judgment dismissing his civil rights complaint filed under 42 U.S.C. § 1983. The parties have expressly waived oral argument, and we agree unanimously that oral argument is not needed. Fed. R. App. P. 34(a).

George was an hourly worker at Vought Aircraft Industries, Inc ("Vought"), and a member of the International Association of Machinists and Aerospace Workers, Aero Lodge 735, a labor union ("the Union"). In 1985, George injured his back, resulting in chronic back pain. Because of his chronic back ailment, George's work attendance became irregular. As a result, his employment was terminated on June 4, 2003. George sought redress against Vought, and the dispute between the parties settled in 2005.

The instant action against the Union seeks relief under the Family and Medical Leave Act of 1993 ("FMLA"), for violations actionable under § 1983. In the complaint, George claims that the Union violated the FMLA when it intentionally and willfully failed and refused to accommodate his medical condition. The Union filed a motion to dismiss arguing: 1) that it is a labor union and not an employer as that term is defined under the FMLA; and 2) that George's complaint is time-barred. The district court determined that the Union was not an employer as defined by the FMLA and dismissed the complaint. George's subsequent motion to alter or amend the judgment was denied. This appeal followed.

We review de novo a district court's dismissal of a complaint for failure to state a claim under Fed. R.

Civ. P. 12(b)(6). *Thurman v. Pfizer, Inc* , 484 F.3d 855, 859 (6th Cir. 2007). The court must construe the complaint in a light most favorable to the plaintiff and accept all well-pleaded factual allegations as true. *Id.* Dismissal is proper only if it is clear that the plaintiff could present no set of facts consistent with his allegations that would entitle him to relief. *Id.*

Upon review, we conclude that the district court properly dismissed the complaint because the Union is not an employer within the meaning of the FMLA. The FMLA protects an employee from adverse action as a result of his taking leave for a serious medical condition. The Act states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(l). The FMLA grants employees a right of action "against any employer" for violations of the act, 29 U.S.C. § 2617(a)(2), and George was employed by Vought, not by the Union. Pursuant to 29 U.S.C. § 2611(4)(A)(ii)(I), the term "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." Whether an entity qualifies as an employer for purposes of the FMLA depends on a number of factors, such as: (1) whether or not the employment took place on the premises of the alleged employer; (2) how much control the alleged employer exerted on the employees; and (3) whether or not the alleged employer had the power to fire, hire, or modify the employment condition of the employees. *See Wascura v. Carver,* 169 F.3d 683, 685-87 (11th Cir. 1999) (discussing § 2611(4)(A)(ii)(I) and drawing on case law that interprets identical language in the Fair Labor

Standards Act (FLSA)); *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995) (interpreting identical language in the FLSA); *Riordan v. Kempiners*, 831 F.2d 690, 694-95 (7th Cir. 1987) (same).

After applying the foregoing factors to the instant case, we hold that the Union is not an employer within the meaning of § 2611(4)(A)(ii)(i). George did not work on the Union's premises, and his work was not controlled by the Union. Moreover, as noted by the district court, "[e]ven though the union's role may have included trying to influence the company to hire, fire, and change work conditions in the employee's favor, it did not have the power to do so directly, and therefore it is not an employer." (Memorandum Order at p. 4).

In this regard, our conclusion is consistent with the construction of other federal employment statutes. Statutes that permit actions against labor organizations specifically provide for suits against labor organizations *in addition to* suits against employers. *See, e.g.*, 42 U.S.C. § 2000e-2(c) (unlawful labor organization practices are distinct from unlawful employer practices under Title VII); 42 U.S.C. § 1211(2) (labor organizations are expressly included in the definition of a "covered entity" within the meaning of the ADA). In contrast the FMLA is silent regarding labor organizations. Because the Union is not George's employer within the meaning of the FMLA, the Union's motion to dismiss was properly granted.

Accordingly, the district court's judgment is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ _____

Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF TENNESSEE
NASHVILLE DIVISION

No 3-06-0477

[Filed August 29, 2006]

JEFF GEORGE,	)
Plaintiff,	)
	)
v.	)
	)
AERO LODGE 735,	)
Defendant.	)
	)

MEMORANDUM ORDER

Before the Court is a Motion to Dismiss and accompanying Memorandum filed by Defendant Aero Lodge 735 (Doc. Nos. 4, 5) and Plaintiff Jeff George's Response thereto (Doc. No. 9). For the reasons stated herein, the Court hereby GRANTS Defendant's motion.

I. BACKGROUND

This case arises out of Plaintiffs termination fiom his job at Vought Aircraft Industries, Inc., while a

member of the Defendant Aero Lodge 735, a labor union. (Doc. No. 1 at 2.) In 1985, Plaintiff suffered a serious injury to his back, the symptoms of which became chronic. *Id.* The symptoms caused Plaintiff to attend work irregularly. *Id.* Plaintiff was terminated on June 4, 2003, and sought redress against Vought Aircraft Industries. *Id.* Plaintiffs dispute with Vought settled, as evidenced by this Court's Order of August 24, 2005 in Docket Number 3:04-0417 (RE 19). *Id.*

On May 12, 2006, Plaintiff filed a complaint in this Court against Defendant International Association of Machinists and Aerospace Workers, seeking relief under the Family and Medical Leave Act of 1993 ["FMLA"] for violations actionable under 42 U.S.C. § 1983. (Doc. No. 1 at 1.) Aero Lodge No. 735 filed a Motion to Dismiss (Doc. No. 4) on behalf of Defendant, and by Order of the Court the Defendant was officially changed to Aero Lodge 735 (Doc. No. 13). Plaintiff seeks economic damages in the amount of $300,000.00 along with reasonable attorney fees as provided by law, and reasonable discretionary expenses of litigation.

II. LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure "tests whether a cognizable claim has been pleaded in the complaint." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). In considering a motion to dismiss for failure to state a claim on which relief can be granted, a plaintiff's factual allegations are accepted as true. *See Wallin v. Norman*, 317 F.3d 558, 561 (6th Cir. 2003). A motion to dismiss for failure to

state a claim upon which relief can be granted must be viewed in the light most favorable to the non-moving party. *See id.* "In order for a dismissal to be proper, it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint." *Bower v. Fed. Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996).

III. DISCUSSION

In his complaint, Plaintiff asserts that Defendant violated the FMLA by intentionally and willfully failing and refusing to accommodate Plaintiff's medical condition. (Doc. No. 1 .) Defendant's Motion to Dismiss contests the FMLA claim on two grounds: first, that the Defendant is a labor union and thereby not an employer under the FMLA, and second, that the statute of limitations has lapsed. The Court agrees that the Defendant labor union is not an employer and cannot be sued under the FMLA, and therefore grants the Defendant's Motion to Dismiss.

A. The Defendant Labor Union Is Not an Employer as Defined by the FMLA

The FMLA protects employees from unlawful employment practices of employers by entitling employees to take reasonable leave for medical reasons. The language of the FMLA clearly applies only to employers. The Act states that "[I]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a).

The Defendant labor union is not an "employer." As defined by the Act, an "employer" is any person who employs 50 or more employees or who possesses the power to control the employee in question at work. 29 U.S.C. § 2611(4)(A). There is also a stipulation in the law that "any person who acts, directly or indirectly, in the interest of a covered employer" is an employer for FMLA purposes. 29 U.S.C. § 2611(4)(A). Plaintiff alleges that because Defendant did not adequately represent his interests, it was acting in the interest of the covered employer and thereby should be considered an employer. (Doc. No. 9 at 2.) The Court rejects this reasoning. The purpose of a labor union is to represent the employee's interests, not the employer's. *See Eckert v. United Automobile Workers, Local Union 897*, 2005 WL 2126295 at *10 (W.D.N.Y. Sept. 1, 2005) (holding that a labor union is not an employer). Inadequate representation of an employee's interest does not mean that the union has begun to represent the employer instead of the employee.

Additionally, factors considered by courts in determining whether an entity is in control of the employee in the work place are: (i) whether employment took place on the premises of the alleged employer; (ii) the degree of control the alleged employer exerted on the employee; and (iii) whether the alleged employer had the power or authority to fire, hire, or modify the employment conditions of the employee. *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1255 (11th Cir. 2004) (citing *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995)). In *Morrison*, the court ruled that an important client is not an employer. Even though the client may have been able to influence hiring and firing decisions, because it did

not actually have the power to hire or fire the employee or directly control his work place or work assignments, it could not have been an employer. *Id.* at 1256-1257.

Likewise, the labor union in this case meets none of these three criteria and therefore should not be considered an employer. Plaintiff did not work on the union's premises, and he was not controlled in his work by the union. Even though the union's role may have included trying to influence the company to hire, fire, and change work conditions in the employee's favor, it did not have the power to do so directly, and therefore it is not an employer.

Also, it is appropriate to regard the FMLA as excluding labor unions from its definition of "employers" because "[o]ther statutes that permit actions against labor organizations do so not by including unions within the definition of employer, but by specifically providing for suits against labor organizations *in addition to* suits against employers." *Eckert*, 2005 WL 2126295 at *9 (emphasis in the original). *See, e.g.*, 42 U.S.C. § 2000e-2 (unlawful labor organization practices are distinct from unlawful employer practices under Title VII); 42 U.S.C. § 12111(2) (labor organizations are expressly included in the definition of a "covered entity within the meaning of the ADA). The FMLA is silent as to labor organizations, and thus the Court does consider labor organizations as an "employer" as defined by the FMLA.

B. The Statute of Limitations on a Willful FMLA Claim Has Not Lapsed

As to the second reason that the Defendant proffers on which to base judgment as a matter of law against the Plaintiff's FMLA claim, the Court does not agree that the statute of limitations has lapsed. The statute of limitations on an FMLA claim is two years from the last event constituting a violation of the FMLA, unless the violation was willful, in which case the statute of limitations is extended to three years. 29 U.S.C. §§ 2617(c)(l)-(2). The Complaint was filed by the Plaintiff on May 12, 2006, two years and eleven months after the Plaintiff was discharged on June 4, 2003. (Doc. No. 1 .) On a motion to dismiss for failure to state a claim upon which relief can be granted Plaintiff's factual allegations are accepted as true. *Wallin*, 317 F.3d at 561. The Complaint alleges that the Defendant "intentionally and willfully failed and refused to accommodate Plaintiff's medical condition" in violation of the FMLA. (Doc. No. 1 at 2.) As such, it is a question for the jury whether or not the violation was willful and therefore whether the statute of limitations has lapsed or not. Therefore, the Court will not dismiss the case on these grounds, but on the grounds that suit alleging a violation of the FMLA cannot properly be brought against this Defendant, as it is not an employer.

IV. CONCLUSION

The Court hereby GRANTS Defendant's motion to dismiss claims against Aero Lodge 735. Plaintiff cannot bring an action against the Defendant under the FMLA because the Defendant is not an employer,

as defined by the Act. As such, Plaintiff's claims against Aero Lodge 735 must be dismissed.

It is SO ORDERED.

Entered this the 29th day of August, 2006.

/s/
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No 06-6363

[Filed September 4, 2007]

JEFF GEORGE,	)
Plaintiff-Appellant	)
	)
v.	)
	)
AERO LODGE 735,	)
Defendant-Appellee	)
	)

MANDATE

Pursuant to the court's disposition that was filed 07/26/07 the mandate for this case hereby issues today.

COSTS: NONE

Filing Fee	$
Printing	$
Total	$

[stamp]

A True Copy

Attest:
Leonard Green, Clerk

By /s/_____
Deputy Clerk